



July 8, 2022

Administrative Conference of the United States
Suite 706 South
1120 20th Street NW
Washington, DC 20036

RE: Disclosure of Agency Legal Materials Comments

Dear Administrative Conference of the United States:

Public Citizen writes in response to the request by the Administrative Conference of the United States (ACUS) for public input on disclosure of agency legal materials, 87 Fed. Reg. 30445 (May 19, 2022).

Public Citizen is a nonprofit consumer advocacy organization founded in 1971. On behalf of its nationwide membership, Public Citizen advocates before the courts, legislatures, and administrative agencies for safer consumer products, corporate accountability, and openness in government decision making. Since its founding, Public Citizen has worked to increase government transparency so that the public can know what the government is doing and hold the government accountable for its actions. Public Citizen has also regularly used the Freedom of Information Act (FOIA) and other open government laws to access records to support its public education and advocacy work.

Public Citizen's comments address three topics: 1) the enforceability of laws providing access to agency legal materials; 2) specific types of agency legal materials that should be made public; and 3) problems with agency FOIA processing that limit the public's access to agency legal materials.

I. The Public's Ability to Enforce Open Government Laws Should be Strengthened.

The effectiveness of federal laws requiring the preservation and disclosure of agency legal materials depends on those laws being enforceable. The public's ability to enforce open government laws should be strengthened to ensure that the public is able to access agency legal materials that the government is required to disclose.

A. FOIA's Reading Room Provision

FOIA requires agencies to make certain material "available for public inspection in an electronic format," 5 U.S.C. § 552(a)(2), including "final opinions ... made in the adjudication of

cases” and “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register,” *id.* §§ 552(a)(2)(A), (B). This provision—often called the “reading room provision”—is vital to ensuring that members of the public have access to agency legal materials. Courts of appeals disagree, however, about whether FOIA grants district courts authority to order agencies to comply with the reading room provision. Although the Second and Ninth Circuits have held that FOIA does grant district courts such authority, *see New York Legal Assistance Group v. Board of Immigration Appeals*, 987 F.3d 207 (2d Cir. 2021), and *Animal Legal Defense Fund (ALDF) v. USDA*, 935 F.3d 858 (9th Cir. 2019), the D.C. Circuit has held that it does not, *see Citizens for Responsibility & Ethics in Washington v. DOJ*, 846 F.3d 1235 (D.C. Cir. 2017).

The position that the provisions of § 552(a)(2) are not judicially enforceable “renders the reading-room provision into precatory language, despite § 552(a)(2) imposing a mandatory duty for agencies to make certain records ‘available for public inspection.’” *ALDF*, 935 F.3d at 875. Clarifying that § 552(a)(2) is enforceable will prompt better agency compliance and support the objectives of FOIA. We urge ACUS to recommend that FOIA be amended to confirm that it provides district courts with authority to order agencies to comply with 5 U.S.C. § 552(a)(2).

B. The Federal Records Act

The Federal Records Act (FRA) “governs the creation, management and disposal of federal records.” *Armstrong v. Bush*, 924 F.2d 282, 284 (D.C. Cir. 1991). The FRA requires the head of each agency to “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency” and to “establish safeguards against the removal or loss of records the head of such agency determines to be necessary and required by regulations of the Archivist.” 44 U.S.C. §§ 3101, 3105. Because records must exist in order to be disclosed, the FRA is essential to ensuring that the public has access to agency legal materials and other agency records.

Unfortunately, there is reason to doubt whether agency officials uniformly comply with the FRA’s recordkeeping requirements. A May 2022 report of the House Select Subcommittee on the Coronavirus Crisis revealed, for example, that former Department of Agriculture Under Secretary Mindy Brashears had used her personal email and phone to communicate with industry representatives and lobbyists. Although the Select Subcommittee found it “unclear whether Brashears took steps to ensure that federal records in her personal possession were copied or forwarded to her official account as required by the FRA, ... [it] ha[d] not obtained evidence that she did so.” House Select Subcommittee on the Coronavirus Crisis, Staff Report, *How the Trump Administration Helped the Meatpacking Industry Block Pandemic Worker Protection 12* (May 2022), <https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2022.5.12%20SSCC%20report%20on%20Meatpacking%20FINAL.pdf>. In another example, documents obtained in response to a FOIA request revealed that former Secretary of Commerce Wilbur Ross had used his personal email for official business, leading the National Archives to open an investigation into the potential unauthorized disposition of federal records. *See Unauthorized Disposition of Federal Records*, Case No. UD-2020-0001, National Archives, <https://www.archives.gov/records-mgmt/resources/unauthorizeddispositionoffederalrecords>.

Although the FRA does not contain a private right of action, members of the public can challenge agency recordkeeping guidelines and directives under the Administrative Procedure Act. *See Armstrong*, 924 F.2d at 297. However, the D.C. Circuit has held that “the FRA precludes direct private actions to require that agency staff comply with the agency’s recordkeeping guidelines.” *Id.* Instead, members of the public are limited to challenging the “agency head’s or Archivist’s refusal to seek the initiation of an enforcement action by the Attorney General.” *Id.* at 295.

The limitations on judicial review under the FRA hamstring the public’s ability to ensure that agency legal materials are preserved and available to be disclosed. We urge ACUS to recommend that the FRA be amended to include a private right of action that allows individuals to seek relief for agency officials’ and staff’s non-compliance with the Act.

II. The Public Should Have Access to Certain Agency Legal Materials that Agencies Do Not Currently Make Publicly Available.

Agencies are currently not making available certain agency legal materials whose release would be valuable to the public, including incorporated-by-reference standards, Office of Legal Counsel (OLC) opinions, agency court filings, and deferred and non-prosecution agreements.

A. Incorporated-By-Reference Standards

The Code of Federal Regulations “incorporates by reference” thousands of privately drafted standards. Although the incorporated material has the same force of law as other parts of federal regulations, it is not published in the Federal Register or Code of Federal Regulations, and the public often faces substantial challenges in accessing it. Tracking down incorporated-by-reference standards is not always an easy task, and, once located, the standards can generally only be accessed on the private organization’s terms. The organization may charge fees for accessing the standards—fees that can be prohibitive for members of the public seeking to understand the law—and may condition access to the standards on the provision of personal information or on the entry of a contract that waives legal rights. Moreover, even when the organization makes the standards accessible, it may restrict the standards’ usability by making them impossible to download or copy.

Limitations on the public’s ability to access and disseminate material that is incorporated by reference into regulations impedes the public’s ability to participate in rulemaking, challenge illegal rules, advocate for change, comply with the law, and hold those who violate their rights accountable. Although we are aware that ACUS has a 2011 recommendation on this topic, we urge ACUS to recommend that the public have full and free access to standards and other materials that are incorporated by reference into federal regulations.

B. Office of Legal Counsel Opinions

OLC “provide[s] controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government.” Memorandum from David J. Barron, Acting Assistant Attorney Gen., *Best Practices for OLC Legal Advice and Written Opinions* 1 (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf>. Despite the authoritative nature of its advice, however, OLC legal

opinions are often kept secret from the public. Making OLC opinions public would inform the public about how the government interprets the law governing its actions, provide government accountability, and help ensure that the executive branch is not exceeding its authority. OLC legal opinions should be presumptively public, with only limited exceptions, such as to protect classified information.

C. Agency Court Filings

Agency legal positions are often contained in agency filings in court, and government briefs are often of interest to the public. Many government district court memoranda and appellate court briefs, however, are not available on agency websites and are difficult to locate online, outside of PACER, which charges a fee, and which can be difficult and costly to search if someone does not already have information about a case.

ACUS should recommend (1) that each agency have a page that lists litigation in which it is involved by case name, docket number, and court, and (2) that Congress make access to documents on PACER free, so that members of the public can easily and freely access government legal materials on that site.

D. Deferred and Non-prosecution Agreements

In lieu of prosecuting corporations for criminal conduct, the Department of Justice (DOJ) often enters into deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). “DPAs and NPAs have been used in virtually all areas of corporate criminal wrongdoing including antitrust, fraud, domestic bribery, tax evasion, environmental violations as well as foreign corruption cases.” Cindy R. Alexander, Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 Am. Crim. L. Rev. 537, 537 (2015). Pursuant to these agreements, “the government agrees ... not to proceed to trial if the corporation complies with the conditions of the agreement over its term.” *Id.* at 544. Although DPAs are filed in federal court, NPAs are not. Brandon L. Garrett, *The Changing Face of Corporate Prosecutions*, 40-OCT Champion 48, 49 (September/October 2016). In addition, although DOJ has issued press releases and made publicly available some DPAs and NPAs, it has not publicly posted all of them, and DOJ does not publicly identify all of the corporations with which it has entered into such agreements.

To increase government transparency and accountability by informing the public about the government’s deferred or non-prosecution of corporate crime, ACUS should recommend that DOJ post online all its DPAs and NPAs with corporations.

III. Agency Processing of FOIA Requests Should Be Improved.

Like many requesters, Public Citizen has long faced numerous obstacles in receiving agency legal material through FOIA, including long delays, inefficient search processes, and agency culture that devalues openness.

A. Delays in Responding to FOIA Requests

FOIA requires agencies to respond to FOIA requests within 20 working days. 5 U.S.C. § 552(a)(6)(A). Nonetheless, agencies often do not substantively respond for *years*. For example, Public Citizen recently asked an agency for an estimated date on which the agency would complete action on a request, *see id.* § 552(a)(7)(B)(ii), and was told that the estimated completion date was more than 1900 days—over five years—after the agency opened the request. Unfortunately, this example is not an outlier: Public Citizen is still awaiting responses to numerous FOIA requests submitted in 2017.

The long periods of time that agencies take to respond to requests for legal and other materials undermine requesters' ability to see what the government is up to and to use the information effectively. Requesters who are seeking agency legal information to understand their rights, conform their actions to the law, advocate for change, or hold the government accountable need the information promptly, not in six months, two years, or six years. Delays also decrease requesters' trust in the government and its commitment to openness and honesty with the American people.

ACUS should recommend that Congress appropriate adequate funding to enable agencies to comply with FOIA requests in a timely manner and that agencies revamp their FOIA practices to reduce and eliminate delays.

B. Inefficient Search Processes

Agencies often use inefficient processes to search for records responsive to a FOIA request. In particular, agencies generally seem to default to entering search terms into a database of the agencies' or identified custodian's records. Although it is important that agencies search for electronic records in response to FOIA requests, keyword searches are not always a logical way to search for agency legal (or other) materials and can end up resulting in large numbers of non-responsive documents that delay production of responsive records.

ACUS should recommend that FOIA staff consult with the agency staff who are familiar with the substantive topic underlying the request to facilitate locating responsive records; in some instances, searches may be more efficiently done by staff familiar with the substantive areas, rather than through keyword searches.

C. Agency Culture

Overall, the public's access to agency legal and other materials is hampered by a failure by agencies and officials to appreciate the objective and importance of open government laws. Too often, agencies view FOIA as a hassle and prioritize closing requests over ensuring that the government is being transparent. The comment we received from one FOIA staff person processing a Public Citizen request—"how would you like it if I looked through your drawers"—exemplifies a widespread attitude that impedes access to non-exempt material.

ACUS should recommend that agency officials emphasize to their staffs the importance of recordkeeping and disclosure requirements to good governance and democratic principles, and the need to take violations of these requirements seriously. Overall, agency staff should treat compliance with these requirements as central to their agencies' work and should approach FOIA requests from a perspective of "how much can I provide" rather than "how much can I withhold."

Thank you for considering these comments. Please feel free to contact us with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Adina H. Rosenbaum". The signature is fluid and cursive, with a long horizontal stroke at the end.

Adina H. Rosenbaum
Attorney, Public Citizen